

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 19, 2006 Session

STATE OF TENNESSEE v. MIRANDA SEXTON

**Appeal from the Criminal Court for Hamblen County
Nos. 05CR471 and 05CR472 James E. Beckner, Judge**

No. E2006-01471-CCA-R3-CD - Filed February 27, 2007

The defendant, Miranda Sexton, appeals from the Hamblen County Criminal Court's denial of alternative sentencing in case numbers 05CR471, containing three counts, and 05CR472, containing five counts. The record supports the court's order, and we affirm. However, we remand for correcting all judgments in case number 05CR471, for the correction of the judgments in counts one through four in case number 05CR472, and for the adjudication of count five in case number 05CR472.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

P. Richard Talley and Christopher D. Brown, Dandridge, Tennessee, for the Appellant, Miranda Sexton.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Victor J. Vaughn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to two counts of simple possession of a controlled substance, both Class A misdemeanors, *see* T.C.A. § 39-17-418(a) (2006), and one count of possession of drug paraphernalia, also a Class A misdemeanor, *see id.* § 39-17-425(a), in case number 05CR471, and one count of vehicular assault, the proximate cause of which was intoxication, a Class D felony, *see id.* § 39-13-106(a), (b) (2006), and one count of child endangerment, a Class A misdemeanor, *see id.* § 55-10-414(1) (2006),¹ in case number 05CR472.

¹This statute was repealed by Acts 2005, ch. 437, § 3, effective July 1, 2005. *See* Compiler's Notes, T.C.A. § 55-10-414. The offense date was January 20, 2005; therefore, the statute was in effect at the time the defendant

(continued...)

The defendant agreed to accept an effective sentence of three years. The defendant's plea agreement is summarized as follows:

Case	Count	Offense	Class	Sentence	Alignment
05CR471	One	Simple Possession	Class A misdemeanor	11 months, 29 days at 3%	concurrent with counts two and three; consecutive to 05CR472
	Two	Simple Possession	Class A misdemeanor	11 months, 29 days at 3%	concurrent with counts one and three; consecutive to 05CR472
	Three	Possession of drug paraphernalia	Class A misdemeanor	11 months, 29 days at 3%	concurrent with counts one and two; consecutive to 05CR472
05CR472	One	DUI	Class A misdemeanor	Dismissed	
	Two	Violation implied consent law	Class A misdemeanor	Dismissed	
	Three	Vehicular assault - proximate cause intoxication	Class D felony	2 years, 1 day	concurrent with count four; consecutive to 05CR471
	Four	Child endangerment	Class A misdemeanor	11 months, 29 days at 30%	concurrent with count three; consecutive to 05CR471
	Five	Leaving the scene of an accident	Class A misdemeanor	No adjudication	

¹(...continued)
committed the offense.

The defendant further agreed that the trial court would determine the manner of service. Following a sentencing hearing, the trial court ordered the defendant to serve her effective sentence in confinement in the county jail and pay fines totaling \$1250.

At the sentencing hearing, Angela Seals, the defendant's mother, testified that, on the night of January 20, 2005, the defendant accompanied her and two minor children to her friend Keith's house. Ms. Seals denied that the defendant or anyone was drinking or taking drugs.

The defendant testified that, on January 5, 2005, she had driven take-out food to her mother, who was at a boyfriend's "drug house," when the police stopped her vehicle. She admitted that she possessed drugs at that time.

The defendant, age 20, also testified that, on January 20, 2005, she went with her mother, her sister, Tiffany (age 12), and Tiffany's friend, Tara (age 13), to her mother's friend's house. While there, the defendant and her mother began drinking alcohol. After some time, Ms. Seals informed the defendant that she and her friend, Keith, were going to the store, and she told the girls to stay there. Shortly thereafter, Tara informed the defendant that her mother wanted her to come home. The defendant tried to contact Ms. Seals several times via Keith's cellular telephone, but she was unsuccessful. Therefore, she decided to drive Tara home. On the way, the defendant drove the car into a "pole."

The defendant testified that, as a result of the accident, Tara broke her pelvis, her lung collapsed, she hurt her wrist, and she had to have reconstructive surgery because of a cut on her face. Her sister Tiffany broke her ankle and had to go to physical therapy. The defendant hit her head and her knees but was otherwise unhurt.

Regarding her past alcohol and drug use, the defendant testified that her mother was her "main drug contact." She started drinking alcohol at age nine and using marijuana at age 12. She testified that she first used marijuana at a party that her mother and stepfather threw. They "gave [her] a joint to keep [her] outside and keep [her] quiet while all their friends were inside doing their thing." The defendant testified that, after she complained of headaches, her mother took her to the doctor, and the doctor prescribed Hydrocodone. She testified that she actually just needed glasses. The defendant testified that she also began using "Hydros" without a prescription when she tried to "rebuild some kind of mother-daughter relationship" with her mother. When she was 18 years old, she visited her mother at a friend's house. Her mother told her that there was ground Hydrocodone available. The defendant snorted it and realized it was cocaine. After that, she became addicted to cocaine.

The defendant also testified that her mother would tell her to do other illegal things. For example, the defendant stole cigarettes from stores.

The defendant testified that, after the accident on January 20, 2005, she realized that she had a problem. She went to "C.S.S." in Sevier county because a family friend recommended it.

She attended intensive outpatient therapy for 12 weeks, meeting four days a week, three hours a day. She then reduced the time to one day a week, and she completed that program. Afterward, she participated in “Celebrate Recovery” and, at the time of her testimony, just started “weaning [herself] off that.”

The defendant stated that she would like to attend college, study history, and become a teacher one day. She testified that she never meant to hurt anyone, that she was remorseful, and that she had not used drugs or alcohol since the accident.

The trial court asked the defendant about bad checks that she had written, and she explained that she wrote them to a grocery store before the accident. The court also asked her about her father, and the defendant stated that she had lived with him since she was approximately 14. She testified that he worked in the family business.

The court found that the defendant had gone through rehabilitation treatment, that she was remorseful, and that she had not used drugs or alcohol since the January 20, 2005 accident. The court found that she had abused alcohol and various drugs and committed various admitted offenses over approximately 10 years. The trial court further found that the wreck caused serious injuries to others, some “apparently” permanent. The court stated that the defendant committed the January 20, 2005 offenses while on bond for the January 5, 2005 offenses.

The trial court stated that the defendant’s amenability to treatment was hard to determine at the current time. The court stated that the best interests of the defendant and the public required some jail time to make a “final impression” and for the “credibility of the courts.” Therefore, it denied probation, community corrections, and judicial diversion.

The court further stated that “[t]he circumstances of the offenses . . . almost scream out that probation be denied at least for some period of time.” The trial judge noted that the defendant’s criminal record did not “occup[y] . . . two or three pages of prior offenses; but . . . it may could have if [one] consider[s] all the time that [the defendant] violated the law by taking illegal drugs, all the times [she has] stolen cigarettes and other things that happened.” The court stated that the defendant had a “sketchy, scattered employment history” and that the victim who received the worst injuries in the accident opposed probation or alternative sentencing.

Finally, the court ordered the defendant to serve her sentence in the county jail, stating “[a]s long as [she is] in the county jail, this Court can keep [it] under review and look at it again and again.”

Now on appeal, the defendant claims that the trial court should have awarded her an alternative sentence. We disagree.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by

the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and that its findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant’s behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -35-103(5) (2006).

The defendant is a standard, Range I offender convicted of a Class D felony and several Class A misdemeanors. As such, she is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See id.* § 40-35-102(6). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Although the defendant does not specifically mention probation on appeal, we note that she was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2006). The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her “suitability for full probation as distinguished from [her] favorable candidacy for alternative sentencing in general.” *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g., State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004) (“Although the defendant enjoyed the presumption of favorable candidacy for alternative

sentencing, the record reveals two solid bases for overcoming the presumption: (1) that confinement is necessary to restrain a defendant who has a long history of criminal conduct and (2) that measures less restrictive than confinement have recently been applied unsuccessfully to the defendant.”); *State v. Christopher C. Rigsby*, No. E2003-01329-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Knoxville, Dec. 29, 2003) (“[T]he record in this case amply demonstrates that the presumption of favorable candidacy for alternative sentencing in general was soundly rebutted by the defendant’s extensive history of lawless behavior,” citing Tennessee Code Annotated section 40-35-103(1)(A)); *see also State v. Nunley*, 22 S.W.3d 282, 286 (Tenn. Crim. App. 1999) (stating that although the factor “social history” must be considered “in determining whether to grant probation. . . , social history is not specifically mentioned by the code as a factor to be used in overcoming the presumption of suitability for alternative sentences”).

The trial court had no evidence before it that allowing the defendant to serve a fully suspended sentence would serve the ends of justice and the best interests of both the public and the defendant. We hold that the defendant has failed to carry her burden of demonstrating suitability for full probation.

Turning to the presumption of favorable candidacy for alternative sentencing that applied to the defendant, the record supports the trial court’s imposition of an incarcerative sentence. The court found that “[t]he circumstances of the offenses . . . almost scream out that probation be denied at least for some period of time.” Furthermore, it found that the wreck’s innocent victims suffered serious injuries, some “apparently” permanent.

The defendant correctly notes in her brief that to deny an alternative sentence based solely on the seriousness of the offense, “‘the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,’ and the nature of the offense must outweigh all factors favoring a sentence other than confinement.” (Quoting *State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)). However, the trial court’s decision was based on other factors, including her prior criminal history and failure to adhere to measures less restrictive than confinement.

First, the trial court found that, during her adult life, the defendant, by her own admission, repeatedly committed offenses. Second, the defendant committed the January 20, 2005 offenses while on bond for the January 5, 2005 offenses. *See State v. Rickey Hailey*, No. 02C01-9705-CR-00198, slip op. at 5 (Tenn. Crim. App., Jackson, May 14, 1998) (affirming incarcerative sentence because defendant committed other offenses while released on bond, satisfying the factor that measures less restrictive than confinement have unsuccessfully been applied to the defendant); *see also Larry Lenord Frazier*, No. M2003-00808-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Nashville, Jan. 8, 2004) (stating the fact that the defendant reoffended while on bond was “an appropriate consideration” under section 40-35-103(1)(C) and (5)).

In our view and in summary, the record supports the manner of service of the imposed sentences. The defendant failed to carry her burden to show entitlement to probation, and the

presumption of alternative sentencing was sufficiently rebutted in this case. The trial court thus did not err by imposing sentences of confinement.

Accordingly, we affirm the court's judgments but remand for the correction of judgments and adjudication of count 5 in case number 05CR472.

The judgments should be corrected as follows:

Case Number 05CR471:

- Count 1: Indicate that this count runs concurrently with count two and three in this case and consecutively to case number 05CR472;
- Count 2: Indicate that this count runs concurrently with counts one and three and consecutively to case number 05CR472;
- Count 3: Indicate that this count runs concurrently with counts one and two and consecutively to case number 05CR472;

Case Number 05CR472:

- Count 1: Indicate that count was dismissed, omit that the defendant was convicted and was sentenced, and omit references to a fine and payment to the Criminal Injuries Compensation Fund;
- Count 2: Indicate that count was dismissed, omit that the defendant was convicted and sentenced, and omit a reference to payment to the Criminal Injuries Compensation Fund;
- Count 3: Indicate that count four runs concurrently with this count and that this count runs consecutively to case number 05CR471;

Count 4: Indicate that this count runs concurrently with count three and consecutively to case number 05CR471; and

Count 5: Adjudicate.

As a result of the plea agreement, count one, driving under the influence of an intoxicant, *see* T.C.A. § 55-10-401 (2006), and count two, violation of the implied consent law, *see id.* § 55-10-406, of case number 05CR472 were dismissed. In count five of case number 05CR472, the defendant was charged with violating Tennessee Code Annotated section 55-10-101(a), leaving the scene of an accident involving death or personal injury. *See id.* § 55-10-101(a). The record fails to reflect the disposition of this count. The transcript is silent regarding this count, and this count's judgment fails to indicate whether the defendant pleaded guilty or whether it was also dismissed. Thus, we remand to the trial court for adjudication of this count.

The transcript and the judgments reflect, relating to counts one through three of case number 05CR471, that the trial court imposed fines of \$325, \$825, and \$225, respectively. These fines actually total \$1375; however, the trial court announced, at the guilty plea hearing, that the total amount of the fines imposed was \$1250. When there is a conflict between the transcript and the judgment form, the transcript controls. *See, e.g., State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *State v. Jimmy Lee Cullop, Jr.*, No. E2000-00095-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (remanding for correction of sentence alignment in judgment form to conform to alignment reflected in transcript).

In addition, the judgment in count one of case number 05CR472 reflects a \$450 fine and \$26.50 to be paid to the Criminal Injuries Compensation Fund. Also in case number 05CR472, count two's judgment reflects another payment of \$26.50 to the Criminal Injuries Compensation Fund. However, both of these counts were dismissed, and the plea agreement contained no reference to payment into the Compensation Fund; therefore, the payments to the fund are inappropriate.

Finally, we remand for the trial court to correct the judgments to properly reflect the alignment of the sentences and the other issues mentioned above.

JAMES CURWOOD WITT, JR., JUDGE